

**Proposed Amendments  
to the Federal Rules of Civil Procedure**

May 20, 2005

*Plain text is unchanged from the existing rule. Text with single underscoring was proposed to be added in the published version of the amendments (August 2004). Text with double underscoring was proposed to be added after public comment (May 2005). Text ~~struck through~~ was proposed to be removed at either stage of the amendment process.*

**Rule 16. Pretrial Conferences; Scheduling; Management**

[...]

**(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1)** to join other parties and to amend the pleadings;
- (2)** to file motions; and
- (3)** to complete discovery.

The scheduling order may also include

- (4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
- (5)** provisions for disclosure or discovery of electronically stored information;
- (6)** adoption of the parties' any agreements the parties reach for protection against waiving asserting claims of privilege or protection as trial-preparation material after production;
- (7~~5~~)** the date or dates for conferences before trial, a final pretrial conference, and trial; and

**(86)** any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

[...]

## **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

[...]

### **(a) Required Disclosures; Methods to Discover Additional Matter.**

**(1) Initial disclosures.** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

**(A)** the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

**(B)** a copy of, or a description by category and location of, all documents, electronically stored information, ~~data compilations~~, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

[...]

### **(3) Pretrial Disclosures**

[...]

**(C)** an appropriate identification of each document, all electronically stored information, or other exhibits, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

[...]

## **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

[...]

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

[...]

### **(2) Limitations.**

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. ~~On motion by the requesting party to compel discovery or for a protective order, the responding party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery of the information from such sources for if the requesting party shows good cause, considering the limitations of of Rule 26(b)(2)(C), and The court may specify terms and conditions for the discovery.~~

(C) The frequency or extent of the use of discovery methods otherwise permitted under these rules...

[...]

## **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

[...]

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

[...]

### **(5) Claims of Privilege or Protection of Trial Preparation Materials.**

**(A) Privileged information withheld.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

**(B) Privileged information produced.** ~~If~~ When a party produces information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, without intending to waive a claim of privilege, the party making the claim it may, within a reasonable time, notify any party that received the information of its the claim and the basis for its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the privilege claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the ~~privilege~~ claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must ~~comply with Rule 26(b)(5)(A) with regard to the information and preserve it the information until the privilege claim is resolved pending a ruling by the court.~~

[...]

## **Rule 26. General Provisions Governing Discovery; Duty of Disclosure**

[...]

**(f) Conference of Parties; Planning for Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due

under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order; ~~whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information;~~

(53) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(64) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

[...]

### **Rule 33. Interrogatories to Parties**

[...]

(d) **Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has

been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[...]

**Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes**

**(a) Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated documents or electronically stored information or any designated documents { — including writings, drawings, graphs, charts, photographs, sound recordings, ~~phonorecords~~, images, and other data or data compilations stored in any medium — from which information can be obtained, translated, if necessary, by the respondent ~~through detection devices~~ into reasonably usable form}, or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

[...]

**(b) Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating in ~~which event~~ the reasons for the objection ~~shall be stated~~. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders,

(i) a A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; and

(ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in an electronically searchable form a form or forms that are reasonably usable;  
and

(iii) a party need not produce the same electronically stored information in more than one form.

[...]

### **Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions**

[...]

**(f) Electronically stored information.** Absent exceptional circumstances  
Unless a party violated an order in the action requiring it to preserve  
electronically stored information, a court may not impose sanctions under these  
rules on the a party for failing to provide electronically stored such information  
lost as a result of the routine, good faith operation of an electronic information  
system, if:

(1) the party took reasonable steps to preserve the information after it knew  
or should have known the information [would be] [likely would be]  
discoverable in the action; and

(2) the failure resulted from loss of the information because of the routine  
operation of the party's electronic information systems.

[...]

### **Form 35. Report of Parties' Planning Meeting**

[...]

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: (brief description of subjects on which discovery will be needed)

Disclosure or discovery of electronically stored information should be handled  
as follows: (brief description of parties' proposals)

The parties have agreed to a privilege protection an order regarding claims of  
privilege or protection as trial-preparation material asserted after  
production, as follows: (brief description of provisions of proposed order)



All discovery commenced in time to be completed by (date). [Discovery on  
(issue for early discovery) to be completed by (date).]

[...]